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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

94-108

In the Matter of:

Implementation of Section 3(n)
and Section 332(c)(3) of the
Communications Act - Regulatory
Treatment of Mobile Services

) GN Docket No. ~~93-252~~

) PR 94-SP1, PR 94-SP2,
) PR 94-SP3, PR 94-SP4,
) PR 94-SP5, PR 94-SP6, ✓
) PR 94-SP7 and PR 94-SP8

To: The Commission

**COMMENTS OF PAGING NETWORK, INC.
ON PETITIONS BY STATE AUTHORITIES
TO CONTINUE REGULATION OF CMRS RATES**

Paging Network, Inc. ("PageNet"), by its attorneys, hereby offers its comments on the various State petitions seeking to continue rate regulation of commercial mobile radio service ("CMRS") providers.¹ PageNet offers paging and enhanced paging services to customers throughout the United States and is, therefore, a CMRS provider. To the extent these State petitions seek authority to regulate the rates of non-cellular entities such as PageNet, PageNet opposes such petitions and respectfully suggests that the statutorily required demonstration of need for such continued regulation has not been meaningfully attempted, much less successfully shown. In support whereof PageNet offers the following.

¹ Petitions were filed pursuant to Section 332(c)(3)(B) of the Communications Act by regulatory agencies of the States of Arizona, California, Connecticut, Hawaii, Louisiana, New York, Ohio and Wyoming seeking permission to continue to regulate CMRS or cellular providers.

1. **The Congress Has Adopted a Specific Standard
for Continued Rate Regulation**

Section 332(c)(3)(A) of the Communications Act, as amended in 1993, provides two specific circumstances when a State may continue regulation upon approval of the FCC. The first is where market conditions with respect to CMRS fail to protect subscribers adequately from unjust, unreasonable or discriminatory rates. The second is that regulation may be continued where the CMRS replaces landline telephone exchange service for a substantial portion of such service in the State, and market conditions would not adequately protect consumers from unjust, unreasonable or discriminatory rates. As the Conference Report makes clear, the market conditions referred to are essentially a lack of competition. H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 493 (1993).

The Commission's Public Notice of July 8, 1994 (DA 94-764) sets forth procedures governing State petitions seeking to continue regulation and lists examples of the types of evidence, information and analysis that would be pertinent to such a determination that continued regulation might be warranted. This information includes not only information regarding the current status of CMRS in the State but also trends of customers and revenues; rates of return and the level of rates; ease of entry; anti-competitive or discriminatory conduct; use of unreasonable or discriminatory rates; and customer satisfaction or dissatisfaction.

**2. The State Petitions Do Not Satisfy the Act's
Criteria with Respect to the Continued
Regulation of Non-Cellular CMRS Providers**

It is clear from a review of the various State petitions that the overwhelming concern of those filing has been the desire to continue the regulation of cellular licensees operating within their States because of their concern that the current duopoly market structure does not provide sufficient competition to obviate the need for oversight. Some of the petitions also show a tendency to use cellular and CMRS interchangeably in spite of the fact that the latter includes paging, dispatch and other services quite different from cellular.

The States of Arizona, California, Connecticut and New York only discuss the continued regulation of cellular. Since PageNet does not offer a cellular service, it will not further comment on those Petitions, except to say that whatever relief is accorded to them should be confined to continued regulation of cellular providers and not applied to CMRS providers generally. Ohio asserts that it does not now regulate entry or rates for CMRS providers (Ohio Petition at 1-2), but wishes to retain the option to do so. Since it does not now do so, it is not eligible to file a petition at this time under Section 332(c)(3)(B) of the Communications Act, but should file under Section 332(c)(3)(A) of the Act at such time as it believes that market conditions require such regulation. Hawaii, Louisiana and Wyoming at least assert that they wish to regulate cellular and other CMRS providers. In each case, however, the record is utterly devoid of any meaningful evidence supporting any continued regulation of non-cellular CMRS providers.

While some of the information suggested by the Commission has been provided regarding cellular operators in the various States, virtually no meaningful data has been submitted with respect to other CMRS providers. Several States did attempt to list the number of radio common carrier entities they regulate and their subscribers. (E.g., Wyoming Petition, Exhibit 7.) Even this information is incomplete, however, because at least for the paging industry, it would not include entities operating solely on private carrier paging frequencies. Moreover, the type of information submitted does not reflect any consumer protection need warranting additional or continued State regulation. For example, Hawaii states that the RCCs operating in its jurisdiction had low or negative rates of return (Hawaii Petition, Attachment 2), and both Hawaii and Wyoming indicated that rates for the RCC entities they regulate remained essentially flat and that there were no requests for increases or decreases. (Hawaii Petition at 6, Wyoming Petition at 4.) Louisiana did offer a single instance of customer dissatisfaction by noting that one paging company was ordered not to operate in Louisiana for one year because of "unauthorized solicitations." (Louisiana Petition at 20.)

No State attempted even the slightest analysis of the competitive situation in paging either today or as expected in the future. Nowhere, apart from the number of providers and minimal data as to the number of customers and revenues, did any of the States attempt to provide any of the information outlined in the Commission's Public Notice. This failure to provide specific data in support of their request to continue regulation of CMRS

providers is all the more significant in light of the Commission's prior finding that "[t]he combination of high capacity, large numbers of service providers, ease of market entry, and ease of changing service providers results in paging being a very competitive segment of the mobile communications market."

Regulatory Treatment of Mobile Services (Second Report and Order), 74 RR 2d 835,870 (1994).

It is obvious from a review of the petitions that the primary concern of each of the States is the rapid growth and limited competition alleged to exist in the cellular market. While the present duopoly situation in cellular is likely to be short-lived in light of the advent of PCS and growth of other competing services, market conditions for cellular bear no relation to the competitive situation in paging. As noted above, the Commission itself has found that paging is a highly competitive industry, exactly the type of service which the Congress sought to prevent the States from regulating in adopting the pre-emption rule.

Several States (Arizona Petition at 8, Louisiana Petition at 46-47) argue that regulation is necessary to protect universal service. While that argument might have some weight with respect to cellular, which is perceived as an alternative to a local exchange service, such a concept has no applicability whatsoever to paging, which by its very nature cannot act as a substitute for local telephone exchange service.

As the Commission's Public Notice made clear, the States bear the burden of proof in this proceeding. To do so they are required to present evidence which would justify relief under the Congressionally-mandated standard. Yet, aside from listing the

number and/or identity of non-cellular RCC carriers in a particular State and occasionally providing information with respect to their revenues and number of subscribers, the States have provided virtually no information to meet their burden. In no case have the States attempted an analysis of the competitive market for non-cellular services. No State has addressed the opportunities for new providers to offer these services, any anti-competitive or discriminatory practices or behavior by non-cellular providers, the existence of unjust or unreasonable discriminatory rates, or, aside from the one instance related by Louisiana, of any customer dissatisfaction with these services or the providers.

For these reasons, then, the States have clearly failed to meet their burden of proof with respect to the need for continued regulation of non-cellular CMRS providers and no such authority should be granted.

Respectfully submitted,

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September 19, 1994

CERTIFICATE OF SERVICE

I, Jette Ward, hereby certify that on this 19th day of September, 1994, a true and correct copy of the foregoing **"COMMENTS OF PAGING NETWORK, INC. ON PETITIONS BY STATE AUTHORITIES TO CONTINUE REGULATION OF CMRS RATES"** was sent via U.S. first-class mail, postage prepaid, to the following:

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